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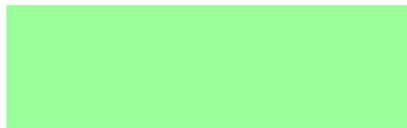
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**

DATE: **OCT 17 2014** OFFICE: VERMONT SERVICE CENTER

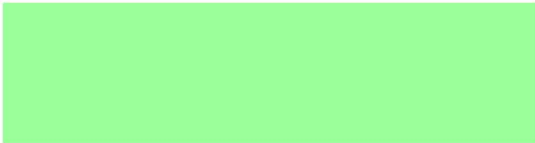
FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office (AAO), and we dismissed the appeal. The matter is again before us on a motion to reopen. The motion will be dismissed.

In the Form I-129 (Petition for a Nonimmigrant Worker), the petitioner describes itself a medical office established in 1995. In order to continue to employ the beneficiary in what it designates as a physical therapy assistant position, the petitioner seeks to extend her classification as a nonimmigrant worker in an H-1B specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, submitted an appeal of the director's decision to this office. We reviewed the record of proceeding and determined it did not contain sufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. We provided a comprehensive analysis of the director's decision and dismissed the appeal.

I. MOTION REQUIREMENTS

Before discussing the particular motion before us, we shall first review the requirements for motions in general and a motion to reopen the proceeding, specifically.¹

A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a USCIS officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action:

[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), "*Processing motions in proceedings before the Service*," "[a] motion that does not meet applicable requirements shall be dismissed."

¹ Counsel filed a timely Form I-290B, Notice of Appeal or Motion, and marked the box at Part 2, Item d of the form, which signifies the "filing of a motion to reopen a decision." Thus, counsel did not identify this motion as a motion to reconsider or claim that this motion satisfied the requirements of a motion to reconsider. Accordingly, we will review this matter only as a motion to reopen our prior decision.

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), "*Requirements for motion to reopen*," states:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence. . . .

This provision is supplemented by the related instruction at Part 3 of the Form I-290B, which states:²

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence.

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); see also *Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

II. DISCUSSION AND ANALYSIS

The submission constituting the motion to reopen consists of the following: (1) the Form I-290B; (2) a brief submitted by counsel; (3) a letter from the petitioner, dated August 20, 2014; (4) a copy of the beneficiary's foreign diploma and transcripts, which were previously submitted with the initial petition; (5) a credential evaluation from the [REDACTED] dated October 7, 2008, which notes that this duplicate report is dated August 6, 2014; (6) an employment verification letter from the petitioner for [REDACTED], dated August 20, 2014; and (7) a copy of [REDACTED] foreign diploma and physical therapist assistant registration certificates, which were previously submitted in response to the director's request for evidence (RFE).

Counsel references the petitioner's August 20, 2014 statement as further support of the petitioner's view that the actual requirements of the job are such that only a candidate with at least a bachelor's level degree in physical therapy can adequately fill the position of physical therapist assistant. In the petitioner's August 20, 2014 letter, the petitioner refers to the beneficiary's training and her New York State license as a physical therapist assistant. The petitioner also repeats that it employs a physical therapist assistant with a bachelor's degree in physical therapy. The petitioner further

² The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

reiterates its claim that the duties of the proffered position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner again asserts that the duties of the position involve skills and knowledge that are so complex that an ordinary physical therapist assistant associate's degree program would be inadequate to prepare the employee to effectively perform the duties of the job.

Thus, the fundamental claims in the petitioner's letter submitted on motion are a reiteration of the facts and assertions already presented in the record of proceeding. As such, and as clear in its content, the petitioner's letter does not state any new facts that would be presented if the proceeding were reopened. The failure to present new facts undermines the value of the petitioner's letter in support of the motion to reopen.

Next, it is worth noting even though counsel has not filed a motion to reconsider, that neither counsel's brief nor the petitioner's letter argues or cites any specific statute, regulation, precedent decision - let alone any that would be relevant to determining whether we misapplied any law, regulation, precedent decision, or Service policy to the evidence of record at the time we rendered our decision. This aspect of the brief and the letter undermines the evidentiary value of the brief and letter for a motion to reconsider.

Dismissal of the Motion to Reopen

Upon review, we find that the petitioner does not substantiate that the submissions on motion were not previously available. Rather all the documents submitted in support of this motion were previously available and, in fact, some were submitted with the initial petition and in response to the director's RFE. The documentation was considered prior to the issuance of the denial of the petition and dismissal of the appeal.

Further, even if the petitioner's letter was viewed – mistakenly – as a "new fact" in and of itself, its content would not merit the reopening of the proceeding. As noted above, in addition to satisfying the minimum requirements at 8 C.F.R. § 103.5(a)(2), the petitioner must also establish that the new facts to be proven in a motion to reopen possess such significance that they would likely change the results of the case. *Matter of Coelho*, 20 I&N Dec. at 473; see also *Maatougui v. Holder*, 738 F.3d at 1239-40. Such is not the case here. Even if we considered the petitioner's repetitive claims in its August 20, 2014 letter in a reopened proceeding, they would not change the outcome of our adjudication.³

³ The petitioner's claims that the proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted a Labor Condition Application (LCA) certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation, an occupation that may be performed by someone with an associate's degree. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Physical Therapists and Aides, available on the Internet at <http://www.bls.gov/ooh/healthcare/physical-therapist->

As such, the petitioner has not established that the evidence submitted on this motion would change the outcome of this case if the proceeding were reopened.

"There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner and its counsel have not met that burden.

III. CONCLUSION

The petitioner should note that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and our previous decision will not be disturbed.

ORDER: The motion is dismissed.

assistants-and-aides.htm#tab-4 (last visited October 17, 2014). In accordance with the relevant DOL explanatory information on wage levels, the Level I wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. As such, the petitioner's claim that the duties are complex, specialized and unique, that she will be required to exercise independent judgment, and that the beneficiary will also be required to supervise physical therapist aides is at odds with the entry level wage it attests to on the submitted LCA. To permit the Level I wage rate attested on the LCA as compensation for a position with complex, specialized, and unique position that requires the exercise of independent judgment and supervisory duties would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). For this additional reason, the petition may not be approved.